Federal Court  Cour fédérale

Date: 20211028

Docket: IMM-4365-20

Citation: 2021 FC 1149

Ottawa, Ontario, October 28, 2021

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

KARIM BABAEI KHEIMEHSARI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a negative decision of the Refugee Appeal Division ("RAD") dated September 4, 2020.

II. Background

[2] The Applicant, Mr. Kheimehsari, is a 53-year old male citizen of Iran who was born in Somehsari, Iran. He alleges that he was a former helicopter pilot for the Sepah. I note that the Applicant uses the terms Sepah (also known as the Islamic Revolutionary Guard Corps) and Iranian Police interchangeably, but for ease of reference, I will use Sepah. In the summer of 2015, he alleges that his commanding officer asked him to go to Syria to "work covertly there under Sepah's command as a favour to al-Assad's government." In response, he pled ill health and did not go. His Basis of Claim ("BOC") alleges that he submitted a visitor visa to Canada in September 2015, which was rejected.

[3] He alleged that he was again asked to go to Syria in October 2016 to assist the authorities "against the Syrian people," which he refused. In response, the Applicant states that the Sepah raided his house and placed him in detention – specifically, in solitary confinement – for approximately 25 days. During these days, he states that he was mistreated, abused, threatened, and tortured, and only released upon his wife's family paying a bribe to officials.

[4] Around December 25, 2016, the Applicant left Iran with the help of smugglers. He left Iran on his genuine passport and then travelled to Turkey, Brazil, Venezuela, and ultimately, Canada, arriving in Toronto on February 17, 2017. On February 25, 2017, he alleges that he was told by his wife that Sepah was looking for him at his house, saying that he was a traitor to his country who had acted against the leadership wishes.

[5] As a result, he made a claim for refugee protection on the basis that he faces persecution by Iranian authorities for his refusal to obey orders to work in Syria.

III. Decision

[6] The Refugee Protection Division ("RPD") determined the Applicant was not a Convention refugee or a person in need of protection, finding that his claims were not established on the merits due to a lack of credibility.

[7] On appeal, the RAD dismissed the Applicant's appeal and confirmed the RPD's negative decision. In their independent analysis, they did not accept his allegations, finding his testimony to not be credible, concluding – among other things – that he was not a helicopter pilot with the Sepah at the relevant time.

IV. Issue

[8] The issue in this case is whether the RAD's decision was reasonable.

V. Standard of Review

[9] As set out by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 [*Vavilov*], at paragraph 23, "where a court reviews the merits of an administrative decision … the starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness." This is the general

presumption, and it is not rebutted on the facts of this case. The standard of review is reasonableness.

VI. Analysis

[10] In deciding the reasonableness of the RAD's decision in this case, there are four sub-issues, on which this Court must decide if the RAD was reasonable. These are (a) the RAD's conclusion that the Applicant failed to establish that he was a pilot for the Sepah during the relevant time; (b) the RAD's treatment of the Applicant's omission from his BOC as undermining his credibility; (c) the RAD's conclusion regarding the Applicant's exit from Iran; and (d) the RAD's review of the RPD decision.

A. *Employment by Sepah*

[11] In concluding that the Applicant was neither a Convention refugee, nor a person in need of protection, the RAD concluded that the Applicant had not established, on a balance of probabilities, his assertion that he was a helicopter pilot for the Sepah during the relevant time period (2015-2017) that he alleged persecution.

[12] The Applicant argues that the RAD failed to consider the evidence of his bank account record. The Applicant submits that this bank account shows that he was paid by the Sepah, establishing his employment. The Applicant also argues that the RAD unreasonably dealt with the evidence which he alleges was destroyed by the Sepah, as they say this should not have been held against him.

[13] The Applicant asserts that this, coupled with the certificates and pictures of him in uniform, as well as the Applicant's statement that he was at Police College (from 1986-1990) are sufficient to establish – on a balance of probabilities – that he worked as a pilot for the Sepah during this relevant time. The Respondent, in contrast, says that this bank statement is insufficient to establish that he worked for the Sepah during the relevant time period, as the only instances the word "Sepah" appears and is also in the name of the bank, and it does not indicate who is paying him or for what role. They note that the onus was on the Applicant to provide evidence to establish this, and he failed to do so – and that the same principle applies to the Sepah's destruction of the other records.

[14] I begin my analysis on this point by noting the RAD is presumed to have reviewed the entirety of the evidence before it, whether or not it specifically indicates having done so in its reasons. The onus rests with the party asserting that they failed to do so to prove it *(Jorfi v Canada (MCI),* 2014 FC 365 at para 31). The Applicant is arguing that the RAD's failure to make specific reference to the bank records went to the root of their findings and rendered the decision unreasonable. The onus is on the Applicant to prove this.

[15] I agree with the Respondent's argument and do not think the RAD was unreasonable in their assessment. It was reasonable for the RAD to not mention something that lacked probative evidence regarding employment. The bank statement is from the Bank Sepah. There are no probative details other than the simple fact that he received money of varying amounts each month for one year (Jan/16 to Jan/17) that under the heading of "detail" on the statement says "salary" and that the acceptor bank was Sepah Bank Bandar Anzali branch and the payment was

from Sepah. A review of the translated document confirms the treatment of this document by the RAD as reasonable given all lack of detail regarding employment such as a paystub would provide.

[16] On the surface it would appear the Applicant is asking the Court to reweigh the evidence given the RAD's findings, which of course is not my role (see, e.g. *Vavilov*, at para 125). More broadly, the Applicant bears the onus of providing evidence to establish his claim on its merits (*Mohamed v Canada (MCI),* 2019 FC 1537). In the view of the RAD, the Applicant failed to do so. He only provided certificates from the 1990s, and dated pictures of him beside an aircraft. He was unable to provide them with any other evidence as to his work with the Sepah as a pilot, stating that they destroyed it, an argument the RAD deemed unreasonable. This is particularly the case given that he is alleging persecution stemming from a specific period of time, to which the evidence must relate to be useful. That is, it must not simply demonstrate that he *was* a pilot, or even a pilot for the Sepah, but it must demonstrate that he was a pilot for the Sepah during the relevant time. I am not satisfied that any of these are necessarily established by the evidence adduced nor was the RAD. After comprehensively assessing all of the evidence (though without mentioning the bank statement), the RAD concluded that it did not establish – on a balance of probabilities – that he was a pilot for the Sepah at the relevant time, nor that he was asked to go to Syria, declined, and was persecuted as a result. This was within their discretion to conclude, and in my view, their treatment of the bank account information does not render this conclusion unreasonable.

B. *Omission from his BOC*

[17] The Applicant next turns to the fact that he failed to mention a visit by his agents of persecution following his 25-day detention in his BOC, but later mentioned it to the RPD. The submission is that the RAD erred in ascribing significance to this omission, and the weight attributed to this determination.

[18] In essence, the Applicant told the RPD that he was apprehended and detained for 25 days that he arranged to leave Iran afterward, and that after his departure, the Sepah came looking for him at his home. He told the RPD that 2-3 weeks after his release, they came by his home to check to make sure that he was there, but did not include this in his BOC. The Applicant asserts that this visit was not consequential, it was not significant to his overall claim, and that the RAD's emphasis on it was unreasonable. They argue that the BOC is to include everything important for one's claim, and that this – a check-up by his agents of persecution – was not important. They assert that the importance ascribed to this influenced the RAD's decision-making, and thus rendered it unreasonable.

[19] I do not agree with the Applicant that this was unreasonable. A visit from his agents of persecution – even if only to check that he had not fled – a few days after they allegedly imprisoned and tortured him – is a significant event in the Applicant's narrative. The RAD concluded that it was significant. I find that the Applicant's arguments equate to a disagreement with the RAD's conclusion on this point, and a request for the Court to reweigh this evidence. On judicial review, *Vavilov* is clear that courts must refrain from reweighing and reassessing the

evidence considered by the decision-maker (para 125). I find the RAD reviewed the evidence before them and made a determination as to its significance, and resultantly determined that the Applicant was not credible. This was reasonable.

C. *Exit from Iran*

[20] The Applicant argues that the RAD's refusal to give credence to the Applicant's testimony regarding his exit from Iran was unreasonable by virtue of being influenced by the panel's previous negative credibility finding (regarding his omission from the BOC). The Applicant provides evidence of bribery and smuggling at the Iranian border, and points to his testimony before the RPD (pages 22-23, 36-40 of the hearing transcript) to demonstrate that he was telling the truth.

[21] The Applicant's position is that this type of determination (though not determinative) is demonstrative of the manner in which the RAD's negative credibility finding unreasonably influenced their treatment of the Applicant. The RAD reviewed both the Applicant's narrative regarding his exit from Iran, evidence regarding the prevalence of human smuggling in Iranian entry and exit points, as well as the objective documentary evidence. The documentary evidence indicated that his real passport was checked at least once during his departure. Considering these two diverging narratives, the RAD concluded that they prefer the objective evidence, and that it – coupled with his loss of the presumption of truth – indicated that the reason he was able to leave on his genuine passport was that he is not wanted by the authorities. The Applicant argues that this conclusion was unreasonably influenced by the RAD's negative credibility finding,

while the Respondent asserts that the Applicant's argument boils down to a mere reweighing of the evidence.

[22] While it is true that the RAD's assessment of the Applicant's departure, as well as their conclusion, was significantly influenced by their earlier negative credibility finding, this does not render the decision unreasonable. It is the purpose of a negative credibility finding to rebut the presumption of truth, as is the case here (*Su v Canada (Minister of Citizenship and Immigration),* 2015 FC 666 at para 11). By definition, when this occurs, the applicant no longer benefits from the presumption that his sworn testimony is true. Thus, it was within the RAD's discretion to prefer the objective documentary evidence – indicating that his passport was checked at least once – to his sworn testimony. Regardless, this point was not determinative, as noted by the RAD at paragraph 34 of their reasons.

D. *The RAD's application of the correct standard of review*

[23] Finally, the Applicant submitted that the RAD must review the RPD on a standard of review of correctness, and failed to do so. It is settled law that the RAD reviews RPD decisions on correctness, and this was acknowledged by the RAD.

[24] I do not agree that the RAD applied the wrong standard of review. The RAD begins by setting out their role on review and in their reasons state that they are "required to examine the record independently and determine if the RPD arrived at the correct decision." Furthermore, the RAD's decision is long, detailed, and contains significant evidence of their own independent

analysis (see, for instance, para 27). Notably, this includes a conclusion where they disagree with the RPD (para 26). Resultantly, I find that the RAD properly reviewed the RPD.

[25] No question for certification was provided by the parties.

JUDGMENT IN IMM-4365-20

THIS COURT'S JUDGMENT is that:

1. This application is dismissed;

2. No question is certified.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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